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No. 396

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

PAULINE W. ACH,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ESTATE OF ERNEST M. ACH, DECEASED,
PAULINE W. ACH, SOLE LEGATEE, AND
PAULINE W. ACH, SURVIVING WIFE,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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Respondent would have this Court deny certiorari in this case on the ground that "whether a particular taxpayer's activities are sufficient to constitute a trade or business within the meaning of the Code depends principally on the facts of each case, and the question is not readily susceptible to a rule of general applicability." (Resp. Memorandum, p. 5)

The question presented by the petition, however, is not basically a factual one. We are not asking this Court to review, weigh, and appraise a multiplicity of factual details which might or might not sustain a finding that an individual is engaged in a trade or business. Rather, the question submitted to this Court is whether an individual, whose only business endeavor is managing the business of a corporation, is an organization, trade, or business separate and apart from that corporation.[1]

Respondent relies on Mrs. Ach's alleged retention of intangible assets as sufficient to justify a holding that she was a "business," thus presenting a legal question that is novel and unique in the field of federal taxation. Diligent search by counsel for petitioners has disclosed no authority in support of any such proposition, and neither respondent nor the Tax Court has offered any support for it.[2]

There is no contention that Mrs. Ach utilized the intangibles allegedly retained in any manner in the conduct of a business separate from that of The Ach Corporation; and while Mrs. Ach did not enter into a contract of employment with the corporation, and did not agree to refrain from competition with the corporation, the facts are that she did work for the corporation and did not compete. Similarly, the valuable trade name "Vogues and Vanities"

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[1] Respondent has stipulated, and the Tax Court found as a fact, that Mrs. Ach did not engage either as a sole proprietor or otherwise in any business endeavor other than management of the dress business during the taxable years in controversy. (R. 48a, 94a)

[2] The Record contains no evidence to support the conclusion that Mrs. Ach retained title to any intangible elements of the dress business and the Tax Court did not find that to be a fact. The statement in the Tax Court's opinion on this point (R. 103a-104a) is contrary to the evidence, including the Stipulation of Facts, and to the Tax Court's own findings of fact. It is also highly dubious legally that any such "intangibles" could exist in a former proprietor after the transfer of the business to a corporation which actually carried on the business.

was never used by Mrs. Ach in a separate business endeavor, but was actually used by the corporation and the Tax Court so found as a fact. (R. 94a)

The Tax Court has thus held that the mere fact that Mrs. Ach *could* have entered into a trade or business separate from that of the corporation, is sufficient to make her a trade or business for the purpose of section 482 of the Internal Revenue Code. This holding significantly extends the scope of section 482 and permits the Commissioner to allocate gross income and deductions in cases where there is in actuality only a single organization, trade, or business.

Thus, contrary to respondent's assertions, it is apparent that the legal issue raised by the petition in this case is one of prime importance in the law of federal income taxation. The impact of the decision below will extend to cases arising under numerous other sections of the Internal Revenue Code where the question is whether the taxpayer is engaged in a trade or business. For these reasons, petitioners believe that a writ of certiorari should issue to review the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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